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No. 73-745

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

JOSEPH DiVARCO and JOSEPH ARNOLD,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RAYMOND J. SMITH
53 West Jackson Boulevard
Chicago, Illinois 60604
Attorney for Petitioners

WILLIAM J. HADDAD
Of Counsel

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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Petitioners, Joseph DiVarco and Joseph Arnold, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Illinois.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported and is printed in the Appendix to this Petition (Appendix A).

JURISDICTION

The judgment of the Court of Appeals was entered on August 14, 1973 (Appendix B). A timely Petition for Rehearing was denied on October 10, 1973 (Appendix C). This petition is filed within 30 days of the denial of the Petition for Rehearing. The jurisdiction of this Court was invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether it is reversible error in a jury trial for the judge to allow the government to impeach the veracity of a defendant by introducing two prior felony convictions that were rendered in 1935 and 1948.

2. Whether a person who misrepresents the source of his income, but not the amount, can properly be convicted in violation of Title 26, U.S.C., Section 7206(1).

NATURE OF CASE

The petitioners, DiVarco and Arnold, were indicted in the United States District Court for the Northern District of Illinois for violation of 26 U.S.C. 7206(1), willfully and knowingly subscribing to and making a false statement as to the source of income on their individual 1965 tax returns (Counts II and III, respectively), and 18 U.S.C. 371, conspiracy to do same (Count I). (App. A, P. 1) [1]

The defendants entered pleas of not guilty to all counts and proceeded to trial before the Honorable Hubert L. Will and a jury on June 5, 1972. On June 15, 1972, the jury returned verdicts of guilty on all three counts (App. A., P. 2).

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[1] References to (App. A. P. 1) are to the Opinion of the Seventh Circuit Court of Appeals below. References to (Tr.) are to Official Transcript of proceedings.

STATEMENT OF THE CASE

The government's only witness on the issues in this case was Irwin "Pinky" Davis, a three-time convicted felon, who testified that while he was associated with Chemical Mortgage and Investment Corporation, (hereinafter referred to as C.M.I.), an admittedly fraudulent operation (Tr. 377-379; 504), in April, 1965, and again in early 1966, the Petitioner, Arnold, requested that Davis obtain from C.M.I. evidence of an income source although the petitioners were not employed with C.M.I. Subsequently, C.M.I. W-2 forms were issued to Arnold for $5,700.00 and DiVarco for $6,750.00 (Tr. 373). The Petitioners filed their 1965 income tax returns listing C.M.I. as the source of such income.

The Petitioner, Arnold, denied Davis' accusation, testifying that the W-2 forms were issued pursuant to investment returns (Tr. 997-998; 1002). Davis testified no such investment was made by either Arnold or DiVarco (Tr. 278, 290, 324, 426, 590).

The trial Court ruled that Petitioner Arnold's testimony could be impeached by the introduction of two prior felony convictions in 1935 and 1948. (See Appendix A)

REASONS FOR GRANTING CERTIORARI

I.

IT WAS REVERSIBLE ERROR FOR THE TRIAL JUDGE TO ALLOW THE GOVERNMENT TO INTRODUCE PRIOR CONVICTIONS IN 1935 AND 1948 TO IMPEACH THE PETITIONER, ARNOLD.

In *United States* v. *McCarthy,* 445 F.2d 587 (7th Cir., 1971), the Seventh Circuit incorporated and adopted proposed Rule 609 of the *Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates.* In *McCarthy,* the conviction was reversed because the defendant was impeached by a prior felony conviction rendered in 1932. In *United States* v. *Malasanos,* 472 F.2d 642 (7th Cir., 1972), the Seventh Circuit reaffirmed *McCarthy,* explaining that although . . . "The proposed rules, by their terms, are not effective until July 1, 1973 . . . This Court in *United States* v. *McCarthy* . . . indicated that the proposed rules should be used as guidelines by district courts." The Court in *Malasanos* did not invoke *McCarthy's* time limitation ruling because ". . . The present case was tried some seven months prior to *McCarthy.*" *Malasanos, supra,* at P. 645, Note 3.

In the instant case the trial judge was apprised of *McCarthy,* but refused to invoke its guidelines regarding the petitioner, Arnold's 1935 and 1948 prior felony convictions for postal extortion and interstate transportation of a stolen auto, respectively. In upholding the trial court's ruling, the Seventh Circuit retreated from *McCarthy's* tenets because the Proposed Rules did not become automatically effective on July 1, 1973, as anticipated. (App. A, Pp. 10-11)

Although the adoption of the *Draft of the Proposed Rules of Evidence* was delayed and revisions have been extensively made since July 1, 1973, the Congressional Committee on Criminal Justice has not changed the import of Rule 609 as to the ten year time limitation. In the original draft of the proposed rules the time limitation on the admission of a prior criminal conviction was ten years. In the committee print out of June 28, 1973, Rule 609's ten year limitation was maintained. In the subcommittee's October 10, 1973 print out Rule 609 appears intact and the ten year time limitation remains unchanged. Therefore, it is apparent that the Seventh Circuit's reluctance to recognize the ten year time limitation because the proposed rules were not automatically adopted is ill-founded in light of the fact that the ten year time limitation has been continually affirmed and reaffirmed by the Congressional Subcommittee on Criminal Justice.

The Seventh Circuit's Opinion mistakenly relied on *Gordon* v. *United States*, 383 F.2d 936 (D.C. Cir., 1967). The *Gordon* case was based on the fact that the defendant there did not object at the trial to the introduction of the prior convictions. The Court in *Gordon* held that it was not plain error for the judge to have allowed these convictions to evidence. The *Gordon* case, therefore, is not the basis for the changing of the Seventh Circuit's Rule in *McCarthy*. Further, the reading of *Gordon* would, in fact, support the Petitioner's position here, for the Court in *Gordon* stated:

> ". . . We must look to the legitimate purpose of impeachment which is, of course, not to show that the accused who takes the stand is a 'bad' person but rather to show background facts which bear directly on whether jurors ought to believe him rather than other and conflicting witnesses."

The Court in *Gordon* further went on to say that though deceit, fraud and stealing go to the credibility of a witness, convictions for violent acts should not be admissible. The Seventh Circuit's Opinion at P. 11 apparently confuses the conviction of the witness, Davis, with those of Arnold. Arnold's conviction for postal extortion was certainly a conviction for a violent crime, and interstate transportation of a stolen automobile does not constitute theft.

Further, the Seventh Circuit's opinion completely overlooks the statement in *Gordon* that:

> "Even one involving fraud or stealing, for example, if it occurred long before and has been followed by a legally blameless life, should generally be excluded on the grounds of remoteness." (P. 940)

The government's rationale then is the same as that in *McCarthy* that when the conviction is remote, as with those of Arnold, the convictions should not be introduced into evidence.

The entire government's case was based on a four-time convicted defrauder, and certainly, therefore, the evidence of the defendant's guilt was extremely close. The Seventh Circuit, therefore, incorrectly distinguished *McCarthy* by stating that in *McCarthy* "there was substantial reason for believing that the evidence of the prior conviction brought about the conviction being appealed in *McCarthy.*" (App. A, P. 10)

WHEREFORE, the trial Court erred in allowing introduction of evidence of the defendant, Arnold's two prior felony convictions.

II.

THE DEFENDANTS' ALLEGED MISREPRESENTATIONS DO NOT CONSTITUTE AN OFFENSE UNDER TITLE 26 U.S.C., SECTION 7206(1).

The Petitioners herein did not evade paying their 1965 federal income tax. Indeed, according to the government's evidence, they overstated their income and paid more taxes than their income required. However, the Seventh Circuit upheld the trial judge's ruling that the "plain language" of Title 26 U.S.C., Section 7206(1) covers any "material matter" stated on the tax return, regardless of the trial Court's concession that this case constituted a case of first impression under Section 7206(1) in that the alleged misstatement was only as to the source of income and did not involve either understatement of income or overstatement of deductions (App. A, P. 3).

It is the Petitioners' contention that the proper charge lay within the general scope of Title 18, U.S.C., Section 1001 and not 26 U.S.C., 7206(1). *Beacon* v. *United States,* 344 U.S. 43 (1952). However, the government had allowed the Statute of Limitations to run under Title 18 U.S.C., Section 1001. Section 1001 encompasses all false statements made to a governmental agency, and the mere fact that an alleged false statement happens to have been made on a Federal income tax return does not give the government jurisdiction to prosecute under Title 26, Section 7206(1). As is pointed out in *United States* v. *Lodwick,* 410 F.2d 1202 (8th Cir., 1969), violations of Title 26, Section 7206(1) are lesser included offenses under Title 26, Section 7201. Only income tax cases are contemplated under Title 26, Section 7206(1) and, therefore, there must be, for example, a false understatement of income, a false overstate-

ment of deductions, a false understatement of capital gains, a false overstatement of capital losses, or the false reporting of a long-term capital gain where, in fact, a short-term capital gain occurred.

The government relied on various authorities for the proposition that the tax consequences of the misrepresentations are irrelevant. In its reliance on *Gaunt* v. *United States*, 184 F.2d 284 (1st Cir., 1950), the government obviously confused the necessity under Title 26, Section 7206(1) of tax consequences as a result of the false statement with the necessity of either understatement of income or overstatement of deductions. *Gaunt*, a case involving an understatement of income, merely says that a tax need not be due and owing for there to be a violation of Title 26, Section 7206(1). *Gaunt* stands for the proposition that if there is a false understatement of income or overstatement of deductions, the fact that for some other reason a tax is not due and owing, there still can be a violation of Title 26, Section 7206(1).

United States v. *Rayor*, 204 F.Supp. 486 (S.D. Cal., 1962) does state that "the choice [of Sections of the Code under which to prosecute, either Title 18, Section 1001 or Title 26, Section 7206(1)] lies with the Government." However, in that case, there was an understatement of income. Under those circumstances, the government can choose between the two statutes. However, where there is no understatement of income or overstatement of deductions, the government is limited to prosecution under Title 18, Section 1001. Since the alleged false statement here is limited to the petitioners' stated source of income, there was no violation prescribed by Title 26, Section 7206(1).

CONCLUSION

For the foregoing reasons the Petitioners respectfully submit that a Writ of Certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

RAYMOND J. SMITH
53 West Jackson Boulevard
Chicago, Illinois 60604
Counsel for Petitioners

WILLIAM J. HADDAD
Of Counsel